

The Application of the Endangered Species Act With Respect to Plants in Washington

(Adapted from the FWS's Virginia Ecological Services Field Office)

The Endangered Species Act (ESA) was passed in 1973 to provide a legal mechanism for the conservation of endangered and threatened species and the ecosystems upon which they depend. The ESA places restrictions on a range of activities involving endangered and threatened animals and plants to help ensure their continued survival. With limited exceptions, the prohibited activities may not be carried out unless authorized by a permit from the U.S. Fish and Wildlife Service (FWS).

Definition of Plant

Section 3 of the ESA defines "plant" as "any member of the plant kingdom, including seeds, roots and other parts thereof."

Prohibited Activities

ESA protection afforded to plants depends on its status (endangered or threatened). The prohibitions apply equally to live or dead plants, their progeny, and parts or products derived from them, except that clearly labeled seeds of cultivated origin of threatened plants are exempt. ESA prohibitions may be found in Section 4(d), Section 9(a)(2), 50 CFR 17.61, and 50 CFR 17.71 and are outlined as follows:

- A. Federally Listed Endangered Plants.** It is unlawful to commit, to attempt to commit, to cause to be committed, or to solicit another to commit the following acts:
 - 1. Import or export (into, out of, or through the U.S.).
 - 2. Remove and reduce to possession from federal property.
 - 3. Engage in interstate or foreign commerce.
 - 4. Maliciously damage or destroy on federal property.
 - 5. Remove, cut, dig up, damage, or destroy on private property in violation of any law or regulation of any state including state criminal trespass law.
- B. Federally Listed Threatened Plants.** It is unlawful to commit, to attempt to commit, to cause to be committed, or to solicit another to commit the following acts:
 - 1. Import or export (into, out of, or through the U.S.).
 - 2. Remove and reduce to possession from federal property.
 - 3. Engage in interstate or foreign commerce.

Permits

Permits are available to allow persons to carry out each of the above-listed prohibited activities. For endangered plants, permits may be issued for: (1) scientific purposes; (2) enhancement of propagation or survival of the species; or (3) economic hardship. For threatened plants, the activity

may be for: (1) scientific purposes; (2) the enhancement of propagation or survival of the species; (3) economic hardship; (4) botanical or horticultural exhibition; (5) education; or (6) other activities consistent with the purposes and policy of the ESA.

The most common types of ESA permits for plants are:

1. *Interstate or Foreign Commerce*: Issued to persons (individuals, botanical gardens, commercial plant nurseries, etc.) who wish to sell plants in interstate or foreign commerce. Most commonly, the applicants are artificially propagating endangered and/or threatened plants, thus meeting the definition of "enhancement of propagation or survival of the species." The vast majority of these permits are issued to authorize the sale of artificially propagated endangered and threatened plants to residents of another state or country, are usually valid for at least two years and are renewable. Permittees are required to submit an annual report providing at least the following information: each protected species that was sold in the proceeding calendar year, how many were sold, to whom they were sold, and how many stock plants were retained.
2. *Remove and Reduce to Possession*: Issued to persons who wish to collect endangered or threatened plants from lands that are under federal jurisdiction (on federal land). The majority of these types of permits are issued for scientific research purposes, although some have also been issued for propagative purposes. They are usually valid for at least one year, are usually renewable and require the submission of annual reports. It is important to remember that a permit is required to remove and reduce to possession not only the whole plant, but also parts of the plant, including pollen, seeds, leaves, cuttings, roots, etc. (See Definition of "Plant," above).
3. *Import and/or Export*: Issued to persons who wish to import or export endangered or threatened plants. The majority of these permits are issued to botanical gardens and herbaria for non-commercial loans and donations with foreign institutions. (IMPORTANT: Please refer also to information on the Convention on International Trade in Endangered Species [CITES] below).

Frequently Asked Questions

Q: Can protected plants be destroyed, damaged, or moved to allow otherwise legal development to occur ("Incidental Take")?

A: It is not prohibited by the ESA to destroy, damage or move protected plants UNLESS such activities involve an endangered species on federal land or if the action occurs in violation of state laws. If a person wishes to develop private land, with no federal jurisdiction involved, in accordance with state law, then the potential destruction, damage, or movement of endangered or threatened plants does not violate the ESA. While there is an Incidental Take Permit process for animals [in Section 10 (a)(1)(B)], there is no such process for plants.

Q: Is it lawful for a state to have more restrictive laws and regulations governing the taking, possession, and transporting of plants?

A: Yes, any state may have more restrictive legislation than the ESA; however, no state may have a less restrictive law or policy. In other words, the ESA may not be undermined or weakened by local or state laws or policies. In Washington, the Washington Department of Natural Resources administers the state endangered species through the Washington Natural Heritage Program.

Q: What plant species are federally listed under the Endangered Species Act in Washington?

A. Listed plants that occur in Washington include Bradshaw's desert-parsley (endangered), golden paintbrush (threatened), Kincaid's lupine (threatened), Nelson's checker-mallow (threatened), showy stickseed (endangered), Spalding's catchfly (threatened), Ute ladies'-tresses (threatened), water howellia (threatened), and Wenatchee Mountains checker-mallow (endangered).

There is also one plant—marsh sandwort—that is listed as endangered but is not known to occur here at this time.

Q: How does the designation of critical habitat enhance protection of endangered and threatened plants?

A. In Washington, only Kincaid's lupine and Wenatchee Mountains checker-mallow has designated critical habitat.

Designation of critical habitat for plant species requires FEDERAL agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat.

Q: It is illegal to possess and propagate listed plants, such as in botanical gardens?

A. The ESA does not prohibit possession of lawfully taken, or acquired listed plants. As long as a botanical garden acquired its stock legally, it may continue to propagate such species and possess them. If the botanical garden wished to sell the plants or any of their progeny in interstate or foreign commerce or export the plants, then permits under the ESA are required. If the garden wishes to sell only in intrastate commerce, then no permit under the ESA is required. In any case, the botanical garden and all recipients of the plants must abide by all state, local and other federal laws, including those requiring permits.

Q. If landowners have a plant on their land, and that plant becomes listed under the ESA, is it illegal for them to take seeds from it? Can they destroy or damage the plant?

A. Possession of lawfully taken or acquired endangered and threatened plant species is not prohibited under the ESA. Therefore, if a person has a plant growing on his land that later becomes listed, it is not an ESA violation for the landowner to damage or destroy the plant or take cuttings, pollen, propagules, etc., from that plant UNLESS such taking of an endangered plant constitutes violation of state law.

Q. Are federally listed plants that have been grown in a greenhouse and planted in the wild protected under the ESA?

A. Generally, there is no difference in protection between naturally occurring, wild plants, and those plants that have been planted by people. A notable exception is cultivated seeds of threatened plants that are accompanied by a statement that they are of cultivated origin.

Q. How does the Convention on International Trade in Endangered Species (CITES) relate to plants?

A. There are many more plants listed under CITES than under the ESA. Plants are listed under CITES when they are at risk due to commercial trade. CITES governs import and export; it does not regulate take or interstate commerce. All imports and exports of CITES-listed plants require accompanying CITES permits or certificates, issued by the FWS.

Q. What is the difference between "candidate," "proposed," and "listed" species?

A. Candidate species are species the FWS has all the information needed to propose for listing as endangered or threatened species, but not yet the subject of a Proposed Rule. Candidate species become proposed species once the FWS has published a Proposed Rule in the *Federal Register*, announcing its intent to list the species as either endangered or threatened and soliciting comments on such listing. The proposed species does not become a listed species until a Final Rule is published in the *Federal Register* announcing that the FWS has listed the species and the effective date of such listing. None of the prohibitions under the ESA are applicable to candidate and proposed species; they apply only to listed species. Permits are not needed for candidate or proposed species.